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No. 91-2024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents,

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF CONCERNED WOMEN FOR AMERICA AND FREE CONGRESS FOUNDATION IN SUPPORT OF PETITIONERS

Wendell R. Bird*
David J. Myers
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400

*Counsel of Record

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICI CURIAE OF CONCERNED WOMEN FOR AMERICA AND FREE CONGRESS FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICI IN THIS CASE[1]

Amicus curiae, Concerned Women for America ("CWA"), is a national non-profit organization representing approximately 600,000 people. CWA's purpose is as

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[1]Counsel of record to the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

follows:

> The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values.

Amicus curiae, the Free Congress Research & Education Foundation, is a non-partisan, non-profit public policy research institute formed in 1977. It is dedicated to advancing traditional values through, among other activities, (i) education and research on issues of legal and social policy, state policy (including the initiative and referendum process), fiscal responsibility, and institutional reform, and (ii) training in conservative governance and coalition leadership, both in the United States and throughout Eastern Europe and the new independent states.

Amici strongly support free speech and religious liberty, and strongly oppose restrictions on speech upon public property that has been opened to the public for expressive activity.

SUMMARY OF ARGUMENT

The Second Circuit has forced a newly-created fourth category into public forum analysis by treating the school district's facilities as simultaneously a designated public forum *and* a nonpublic forum. The facilities cannot be both.

The school district's facilities are a designated public forum, as the Second Circuit held. The exclusion of only religious speech is therefore the same content discrimination this Court condemned in *Widmar*. It is also viewpoint discrimination (which is unconstitutional in both designated and nonpublic fora) because Lamb's Chapel does not seek access to speak about the subject of religion, but to speak about

other subjects (such as the family) from a religious viewpoint.

The school district's facilities are not a nonpublic forum, but even if they are the content-based exclusionary policy is unconstitutional. The Second Circuit erroneously assumed that the government has unlimited authority to exclude any subject or speaker from a nonpublic forum for any reason or for no reason, misconstruing this Court's nonpublic forum cases. Content-based exclusions from nonpublic fora must be justified by the purposes of the forum, under *Grayned*. Here, no such justification is offered and none is possible.

The Second Circuit cannot have applied this Court's forum analysis correctly. First, the Second Circuit's reasoning is circular, making the designated forum a nonpublic forum only as to religious speech simply because the school district says so and allowing the school district to opt out of strict scrutiny review at will. Second, the Second Circuit's result irreconcilably conflicts with *Widmar*. If the Second Circuit did apply forum analysis correctly, that analysis has departed from the correct constitutional principles set out in *Grayned* and should be modified to avoid circularity and to avoid conflict with *Widmar*, as a host of commentators have urged.

Additionally, the exclusion of only religious speech violates the First Amendment independent of the forum and content discrimination rules. It is invidious discrimination because it is just as content-based as an exclusion of all blacks' speech would be. It is a prior restraint because it is arbitrary--there is no articulable reason for it--and because it is the same discretionary and standardless restraint condemned in *Cantwell*. It violates both the Establishment and the Free Exercise clauses by its hostility to religion. Finally, it is overbroad because it necessarily censors *non*religious speech as well.

ARGUMENT

I. THE SCHOOL DISTRICT'S EXCLUSION OF ONLY RELIGIOUS SPEECH IS UNCONSTITUTIONAL UNDER PUBLIC FORUM ANALYSIS.

A. Discriminatory Content-Based Exclusions Are Unconstitutional in a Designated Public Forum Such as the School District Facilities Here.

1. The School District's Facilities Are a Designated Public Forum, as the Second Circuit Found.

The Second Circuit correctly held that the school district by policy and practice had opened its facilities to the public for expressive activity, so that the facilities had become a designated or limited public forum. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381, 386, 388 (2d Cir. 1992). However, the Second Circuit went on to relegate the facilities to a previously unknown "subcategory" of designated public forum "that allows it to remain *non-public* except as to specified uses." *Id.* at 386.[2] Because the school categories of speech. *Id.* at 388. As a result of this judicial creativity, the Second Circuit paradoxically permitted the school district to engage in content discrimination that is unconstitutional in designated public fora and to engage in viewpoint discrimination that is unconstitutional even in nonpublic fora. If permitted, this approach would allow any content discrimination, anywhere, any time: merely by governmental definition, the front of the constitutional bus becomes a designated forum for nonreligious speech, and the back of the bus is where religious speech must go.

2. Content and Viewpoint Discrimination Against Religious Speech Are Unconstitutional in a Designated Public Forum, as This Court Held in Widmar.

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[2]Throughout this Brief, all emphasis is added and all internal citations are omitted unless otherwise noted.

By definition, the school district's exclusion of all speech "for religious purposes," 959 F.2d at 387, is discrimination based on the content of speech. Content- and viewpoint-based restrictions are "incompatible with the central precepts of the first amendment" because, first, they "mutilate 'the thinking process of the community.'" Stone, *Content Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 55 & n.37 (1987) (quoting A. Meiklejohn, *Political Freedom* 27 (1960)). Second, such restrictions carry a high risk of improper motivation, "for government officials will often, consciously or unconsciously, be influenced by their own opinions about the merits of the restricted speech." Stone, 54 U. Chi. L. Rev. at 56. The risk of improper motivation is not limited to society-wide prohibitions of a message or a category of speech, but also exists for "situational restraints," such as the specific exclusion in this case. Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1225 (1984).

Thus, in *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981), this Court applied strict scrutiny and struck down a public university's selective exclusion of only religious speech from its designated forum. There was no hint of the verbal legerdemain used by the Second Circuit--i.e., that the university could save its discrimination by positing a nonpublic forum for religious speech and a designated public forum for other speech.

This case is no different from *Widmar*. While the Second Circuit attempted to distinguish *Widmar*, the only argument it could find was that *Widmar* involved students seeking access to a forum open only to students, while this case involves "outside organizations seeking access." 959 F.2d at 389. The distinction is nonexistent because the forum at issue here has not been limited to students, but has by policy and practice been opened to "outside organizations." Lamb's Chapel is no more of an outside organization than are the humane societies, property owners' associations, dance groups, choral societies, political commit-

tees, Brownies, and the dozens of other social, civic, and recreational groups given access to the school district's facilities. None of those groups is a student group, and there is no argument in this case that the school district's facilities have been opened only to student groups. Lamb's Chapel is within the same class as the multitude of other groups that have been granted access, but has been excluded solely because of the religious content of its speech. This case is therefore governed by *Widmar* and the school district's policy cannot stand.[3]

Widmar merely applied, in the context of a designated forum, a bedrock principle of the First Amendment: selective exclusion from a public place on the basis of speech content is unconstitutional.

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it *may not select which issues* are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. *Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.*

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[3] Widmar's holding that religious speech may not be excluded from a designated forum absent a compelling state interest is not contradicted by some arguably unbounded dicta in Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("a public forum may be created by government designation . . . for use by the public at large . . . , for use by certain speakers, or for the discussion of certain subjects"). Widmar dealt squarely with the identical issue presented here--denial of access to a public school's designated forum based solely on the religious content of the applicant's speech, where the applicant is of the same class of speakers as those to whom the forum has been opened. Cornelius did not address religious speech at all. Just as important, the exclusion upheld in Cornelius was premised on the applicants' demonstrated disruptiveness. 473 U.S. at 810-11.

Police Dept. v. Mosley, 408 U.S. 92, 94 (1971) (invalidating city ordinance prohibiting all picketing next to a school except labor picketing).

3. Censorship of Religious Speech Is Also Viewpoint Discrimination.

The Second Circuit failed to realize that the school district's blanket exclusion of all religious speech also constitutes viewpoint discrimination, which is unconstitutional whether the school district's facilities are a designated forum or a nonpublic forum. The government engages in viewpoint discrimination when it "grant[s] to 'one side of a debatable public question . . . a monopoly in expressing its views.'" *United States v. Kokinda*, --- U.S. ---, 110 S. Ct. 3115, 3125 (1990), quoting *Monterey County Democratic Central Committee v. United States Postal Service,* 812 F.2d 1194, 1198-99 (9th Cir. 1987). Here, the school district grants a viewpoint monopoly by allowing speech by anyone who finds religion unilluminating on the issue discussed, and at the same time barring speech by anyone who finds religion illuminating on the issue and wishes to say so. The exclusion is not of speech about the *subject* of religion, but of speech expressing religious *viewpoints* about other subjects (in this case, the American family).[4] Nearly all reli-

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[4] Exclusion of all speech about a particular subject may have a viewpoint-differential impact and

gious speech is also some other type of speech, which is also then censored by the school district. The purportedly content-neutral exclusion of all religious speech is not viewpoint-neutral, but is a masquerade for viewpoint discrimination. *See May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986) ("allow[ing] the premises to be used for any meetings by teachers except prayer meetings . . . would be a restriction discriminating against a particular point of view").

It is not viewpoint neutral to say that all religious speech equally must go to the back of the expressive bus.

B. Discriminatory Content-Based Exclusions Are Unconstitutional Even in a Nonpublic Forum When Not Tied Directly to the Purposes of the Forum.

1. The Court Generally Has Upheld Only Content-Neutral Exclusions from Nonpublic Fora.

Where this Court has upheld restrictions on speech in nonpublic fora, most often the restrictions were content-neutral. In *International Society for Krishna Consciousness, Inc. v. Lee*, --- U.S. ---, 112 S. Ct. 2701 (1992), and in *Kokinda*, --- U.S. ---, 110 S. Ct. 3115, the restrictions in question forbade *all* solicitation based on "the inherent nature of solicitation itself, a content-neutral ground," and "[did] not discriminate on the basis of content or viewpoint."

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should be strictly scrutinized, as Dean Stone has pointed out. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 109-11 (1978). There is a clear viewpoint-differential impact here: exclusion of all speech about the subject of religion furthers non-religious viewpoints, which prefer that religion not be discussed at all, and treats religious viewpoints as second-class in comparison to other viewpoints. The harm is not ameliorated by treating all religious viewpoints as equally second-class.

Kokinda, --- U.S. ---, 110 S. Ct. at 3124-25 (plurality opinion). *See also id.*, --- U.S. ---, 110 S. Ct. at 3126 (Kennedy, J. concurring in the judgment) (ban on all solicitation "does not discriminate on the basis of content or viewpoint"). In *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981), the restriction banned *all* unstamped mailable matter from letterboxes. The Court upheld the restriction because it was a "content-neutral regulation." *Id.* at 131 n.7. In *Adderley v. Florida*, 385 U.S. 39, 48 (1966), the Court upheld application of a state trespass statute against protestors who blocked a jail driveway and adjacent property because the trespass statute had a "lawful nondiscriminatory purpose."[5]

Other exclusions that have been upheld were based on the identity of the speaker but were content-neutral and were based on incompatibility with the purposes of the forum. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 46, 49 (1983) (distinction between speakers upheld "based on the *status* of the respective unions," not on the content of their speech); *id.* at 55 (reiterating "difference in status"); *Widmar*, 454 U.S. at 268 n.5 (university forum open to student groups not necessarily open to non-students). Such speaker identity distinctions are permissible only "in the process of limiting a nonpublic forum to activities *compatible* with the intended purpose of the property." *Perry*, 460 U.S. at 49. *Accord* Comment, *Forum Over Substance: Cornelius v. NAACP Legal Defense & Education Fund*, 35 Cath. U.L. Rev. 307, 310 & n.27 (1985); Buchanan, *The Case of the Vanishing Public Forum*, 4 U. Ill. L. Rev. 949, 962 n.122, 973-74 (1991) (restrictions based only on speaker identity are content-neutral and are properly tested against a reasonableness standard). Valid speak-

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[5] *Accord* May, 787 F.2d at 1113 (exclusion of all teacher groups upheld, but exclusion only of religious teacher groups would be "an abridgment of free speech however one classifies the [school] along the range of public-private forum").

er identity distinctions are content-neutral; they cannot exclude all religious speakers.

Subject matter exclusions, on the other hand, because they are by definition content-based, should trigger strict scrutiny (or at least intermediate scrutiny). *See Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 537, 538 (1980) ("First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire *topic*"; "[to] allow a government the choice of permissible *subjects* for public debate would be to allow that government control over the search for political truth"). Thus, the Court has struck down content-based restrictions on speech in nonpublic fora. *City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 (1976) (board of education could not "be required to discriminate between speakers on the basis of . . . the content of their speech").

2. Content-Based Exclusions (Including Subject Matter Exclusions) Are Upheld Only Where They Are Necessitated by the Purpose of the Forum and Are Ideologically or Viewpoint Neutral.

a. The Three Content-Based Exclusions that the Court Has Upheld Were Viewpoint Neutral and Were Necessitated by the Purposes of the Forum in Question.

In three cases to date, this Court has upheld content-based exclusions from nonpublic fora. The special circumstances justifying those exclusions do not exist in this case, even assuming that the school district's facilities can be treated as a nonpublic forum.

First, in *Cornelius*, the Court upheld the federal government's exclusion of legal defense and advocacy groups from the Combined Federal Campaign charitable fund-raiser because those groups' participation in the CFC "jeopardized the success of the Campaign." 473 U.S. at 810. The validity of the exclusion did not

hinge on the government's carte blanche authority to exclude speakers from the nonpublic forum for any reason or for no reason at all. Instead, the government was required to show that the excluded speaker "would *disrupt* [the] forum and *hinder its effectiveness for its intended purpose*." *Id.* at 811. *See also International Society for Krishna Consciousness, Inc. v. Lee*, --- U.S. ---, 112 S. Ct. at 2714 (O'Connor, J., concurring) (*Cornelius* was premised in part on record evidence that participation of excluded groups "would have jeopardized the success of the campaign"; absence of similar evidence from airport authorities made ban on leafletting in airport unreasonable).[6]

Here, the school district has made no attempt to show that Lamb's Chapel's proposed film series on the family would in any way disrupt the forum, jeopardize its success, or hinder its effectiveness. Instead, the school district takes *Cornelius* to the extreme and applies it where there is no disruption and where the proposed religious speech is functionally indistinguishable from permitted speech.

Second, in *Greer v. Spock*, 424 U.S. 828 (1976), the Court upheld a military base's regulation prohibiting all partisan political speeches. The Court premised its decision on the unique characteristics of military bases. *Id.* at 838. Because of the "special constitutional function of the military in our national life," *id.* at 837, the base commander was authorized to determine which civilian speakers "would be

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[6]If the result in Cornelius was not premised on disruption and incompatibility with the forum's purposes, the case is inconsistent with previous cases that focused on compatibility and that allowed content-based distinctions only when the nature of the forum dictated that they be allowed. *See* Comment, 35 Cath. U.L. Rev. at 331 & n.189 (criticizing Cornelius as inconsistent with Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), Widmar, 454 U.S. at 263, and Mosley, 408 U.S. at 92).

supportive of the military mission" of the base and which would not. *Id.* at 838 n.10.[7] The relaxed scrutiny applied in the special case of a military base in *Greer* has no application to the forum of the school district facilities in this case.

Finally, in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court upheld a city's exclusion of political advertisements from spaces in city buses that were used only for commercial advertisements. As this Court recently stressed in describing *Lehman*, the city was "acting as a proprietor, managing its internal operations, rather than acting as lawmaker with power to regulate or license." *International Society for Krishna Consciousness, Inc. v. Lee*, --- U.S. ---, 112 S. Ct. at 2705. The Court's opinion in *Lehman* repeatedly stressed the solely *commercial* purpose of the car card spaces. 418 U.S. at 303-304 ("the city is engaged in commerce"; "[t]he car card space . . . is a part of the commercial venture"; "[r]evenue . . . could be jeopardized" by accepting political advertisements; the city was acting "in a proprietary capacity"). *See* Cass, *First Amendment Access to Government Facilities*, 65 Va. L. Rev. 1287, 1347 (1979) (*Lehman* was correctly decided because of the validity of "[t]he distinction between commercial and other uses"). In addition, a majority of the Court in *Lehman* was concerned that riders of city buses were a "captive audience" that the city could reasonably choose to shield from political advertising. 418 U.S. at 304 (plurality opinion); *id.* at 308 (Douglas, J., concurring).

None of the justifications for the restriction in *Lehman* is present here. Neither the public schools as schools nor the designated forum that the district

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[7] In an interesting contrast to the attitude of the school district officials in this case, one of the civilian speeches that the base commander in Greer had deemed to be "supportive of the military mission" was "a religious service by a visiting preacher at the base chapel." 424 U.S. at 838 n.10.

makes available after school hours are commercial enterprises, as the buses and the car cards were for the city in *Lehman*. Nor is the audience for any of the functions that occur in the school district's designated forum in any sense a captive audience; those who attend functions at the school district's facilities do so voluntarily and because they choose to hear the speech that occurs there.

b. The Touchstone of Public Forum Analysis Has Always Been Whether the Manner of Expression Is Basically Incompatible with the Normal Activity of a Particular Place at a Particular Time.

Long before the Court definitively enunciated the categorization of fora as public, designated, and nonpublic, it had analyzed cases involving speech on public property using the principle that still underlies public forum analysis: compatibility of the speech with the normal use of the forum.

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. *The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.*
>
> . . . .
>
> . . . [I]n each case, expressive activity may be prohibited if it "materially disrupts [the forum] or involves substantial disorder or invasion of the rights of others."

Grayned v. City of Rockford, 408 U.S. 104, 118 (1972). The Court made the same point in *Mosley*, 408 U.S. at 100, which was decided the same day as *Grayned*. In *Mosley*, the Court invalidated a

city ordinance distinguishing between labor and non-labor picketing because one was no more disruptive than the other.

Grayned's emphasis on compatibility of the proposed speech with the purposes of the forum still underlies public forum analysis. *See International Society for Krishna Consciousness, Inc. v. Lee*, --- U.S. ---, 112 S. Ct. at 2708 (emphasizing "the disruptive effect that solicitation may have on business"); *id.* at 2718 (Kennedy, J., concurring in the judgment) ("If the objective, physical characteristics of the property at issue and the actual public access and uses which have been permitted by the government indicate that expressive activity would be *appropriate and compatible* with those uses, the property is a public forum."); *id.* at 2724 (Souter, J., concurring) ("we should classify as a public forum any piece of public property that is 'suitable for discourse' in its physical character, where expressive activity is *'compatible'* with the use to which it has actually been put"), citing *Grayned*, 408 U.S. at 116. *See also Widmar*, 454 U.S. at 277 (recognizing "a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education"); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) ("nondisruptive speech . . . is still protected speech even in a nonpublic forum").

3. The School District's Exclusion of All Religious Speech Is Not Necessitated by the Purposes of This Forum Nor by Any Incompatibility with Its Normal Activities.

The school district is unable to offer any forum-related justification for its discriminatory exclusion of all religious speech. Absent some justification, however, the exclusion cannot stand even if the school district's facilities are a nonpublic forum. As Justice O'Connor noted in discussing previous nonpublic forum cases:

> [W]e have required some explanation as to why certain speech is inconsistent with the intended use of the forum.

International Society for Krishna Consciousness, Inc. v. Lee, --- U.S. —, 112 S. Ct. at 2714 (concurring opinion). Otherwise, the forum easily becomes a disguise for viewpoint discrimination. *See* Farber & Nowak, 70 Va. L. Rev. at 1240-41 ("[T]he government's goals in passing the challenged situational restraint . . . must relate to the specific situation and to the kind of speech being regulated. If the governmental regulation bans a certain type of speech in schools, the government goals should relate to schools and to the effects of the regulated speech in the school environment, and not to the general undesirability of certain kinds of speech."); Stone, 46 U. Chi. L. Rev. at 114 ("[T]he state must explain not only why it restricted the speech it restricted, but also why it failed to restrict the speech it exempted from the restriction. It must, in other words, justify the content-based restriction. Such justification is necessary . . . because the very existence of the content-based distinction tends to undercut the state's showing . . . that the restriction is designed to serve some substantial government purpose."). *Accord* Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1827 (1987) (selective access to a forum is permissible only for "the achievement of legitimate institutional ends").

The school district might attempt to offer Establishment Clause concerns as a justification for the exclusion of all religious speech, but those concerns have already been disposed of by this Court. *See Board of Educ. v. Mergens*, --- U.S. ---, 110 S. Ct. 2356, 2373 (1990) (Equal Access Act for student-initiated religious groups in public high schools does not violate Establishment Clause); *Widmar*, 454 U.S. at 270-75 (offering public university facilities to religious groups on the terms available to other groups does not violate Establishment Clause).

The school district might also attempt to offer con-

troversy-avoidance concerns as a justification, but those concerns too have been disposed of repeatedly by this Court:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Tinker, 393 U.S. at 514. *See also id.* at 508 ("in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"); *Mosley*, 408 U.S. at 100-101 (citing and quoting *Tinker*).

4. The Exclusion of All Religious Speech, While Permitting All Other Categories of Speech, Is Unconstitutional Viewpoint-Based Discrimination, Even if the Second Circuit Were Right that Content-Based Discrimination Is Permissible in Designated Public Fora.

As this Court has repeatedly held, viewpoint exclusions are the prime evil against which the First Amendment protects, even in nonpublic fora. "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (city-owned utility poles a nonpublic forum).

Here, the school district contends that its exclusion is viewpoint neutral because it applies to all religious speech. But the purportedly content-neutral exclusion of all religious speech is in fact viewpoint discrimination. *See supra* Section I.A.3. In this instance, the proposed speech would have been a religious viewpoint on the subject of the American family. In the next instance, the speech may be a religious viewpoint on politics, the arts, crime and punishment, and so on. The school district's policy grants access

to the Manorville Humane Society but denies access to any animal protection society operating with a religious viewpoint on the morality of cruelty to animals. The policy grants access to H.E.L.P. (Help Every Living Person), but denies access to any poverty relief organization with a religious viewpoint on an individual's obligation to help the less fortunate. The school district's policy is nonsensical, but it is also unconstitutional viewpoint discrimination.

C. If Recent Public Forum Analysis Permits the School District's Censorship in This Case, the Court Should Modify that Analysis To Reaffirm the Compatibility Standard.

1. The Second Circuit's Public Forum Analysis Is Circular and Destroys All Distinction Between a Designated Forum and a Nonpublic Forum.

According to the Second Circuit, the school district's facilities are a designated forum only for permitted speech: "the school property in question falls within the subcategory of 'limited public forum,' the classification that allows it to remain non-public except as to specified uses." 959 F.2d at 386. Contrary to this Court's precedent, the Second Circuit failed to require the school district to justify its exclusions based on any particular purpose of the forum. The Second Circuit's approach therefore allows the school district entire freedom to specify discriminatorily the uses (i.e., the subjects and viewpoints) that it will accommodate in its designated forum and to exclude discriminatorily other subjects and viewpoints (by failing to specify them), all without relation to the purpose of or activities in the forum and without any evidence of disruption. Thus, the school district's facilities are a designated forum for the "Hampton Council of Churches/Family Counseling Services Billy Taylor Concert" and the "Southern Harmonizers Gospel Singing," but remain a nonpublic forum for Lamb's Chapel's film series *simply because the school district says so*.

The Second Circuit's approach makes public forum

analysis circular--the school district can restrict speech simply because it intends to:

> [H]ere, because the Court categorizes a place as a particular type of forum by reference to the restrictions on expression the government *intended* for that place, the Court allows the government to set its own standard of review. Thus, a circular pattern emerges. The government decides to restrict expression in a place. The Court, seeing that the government intended to restrict expression there, categorizes the place as a type of forum according to the degree of restriction the government intended. The type of forum then dictates the degree of restriction. When the restriction is challenged, the Court, with an appropriately relaxed examination, accepts the government's justifications, thereby validating the restrictions. Thus, the government is permitted a restriction because the government intended that restriction.

Comment, 35 Cath. U.L. Rev. at 332 (emphasis in original).

The result is that speakers who have been deliberately excluded from a forum will never succeed in obtaining access to the forum:

> If a limited public forum is neither more nor less than what the government intends it to be, then a first amendment right of access to the forum is nothing more than the claim that the government should be required to do what it already intends to do in any event.
>
> [This approach] shrinks the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to gain access to such a forum. If the reach of the forum is determined by the intent of the government, and if the exclusion of the plaintiff is the best evidence of that intent, then the plaintiff loses in every case.

Post, 34 UCLA L. Rev. at 1756-57.

To derive its approach, the Second Circuit misconstrued *Perry*, as commentators have feared would happen:

> *Perry* distinguishes the various fora on the basis of the government's action in allowing or limiting access to particular property, a distinction which is valuable as a broad outline of forum analysis. This distinction is misleading, however, if used as a method of analysis rather than a summary of that analysis, as it implies that the government may restrict expression in some places simply because it intends to restrict expression in those places. A closer look reveals that . . . the underlying principle remains quite simple: restrictions on expression are constitutionally permissible only to the extent that such restrictions require compatibility with the normal use of the property.

Comment, 35 Cath. U.L. Rev. at 310-11.

A final flaw of the Second Circuit's forum analysis is that the school district can set its own standard of review and can opt out of the compelling interest test (or an intermediate test) at will:

> The most troubling thing . . . is that censorship can become self-justifying . . . . The implication is that the government can convert a limited public forum to a nonpublic forum without any reason whatever, or even because of hostility to speech. The government's intention to close or limit the forum may be shown by evidence that it has excluded speakers in the past. A choice to close the limited public forum is not constrained by a requirement that all speech be treated equally; the government can

> allow some speakers into a nonpublic forum while excluding others. . . .
>
> It makes little sense to apply the compelling interest test to a category of cases and then let the government opt out of the category at will.

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 46-47 (1986). *See also* Comment, 35 Cath. U.L. Rev. at 333 ("Motivation becomes justification, without regard to the constraints imposed by the first amendment.").

2. The Second Circuit's Public Forum Analysis Treats Religious Speech Less Fairly Than Other Categories of Speech, in Direct Conflict With Widmar.

Widmar is virtually identical to this case: a governmental unit purported to open a forum to all speakers within a designated class except religious speakers. The Second Circuit's decision in this case, however, is contrary to this Court's resolution of the issue--this Court did not allow the university in *Widmar* to define the forum as open to "all student groups except religious student groups" and thereby to evade strict scrutiny of its exclusion by simple semantics.

Professor Buchanan anticipated this conflict in a hypothetical example that might as well have been lifted directly from this case:

> The strength of the *Widmar* holding erodes if the government is permitted to frame its original invitation on the basis of the subject matter of speech. For example, suppose the university had extended its original invitation to "all students who want to speak on any subject other than religious matters." If the applicable forum--the university's facilities--retains its nonpublic forum status as to speakers outside the defined class, the Court

> will apply to restrictions affecting such speakers the more lenient standards of review used in nonpublic forum cases. That, in turn, provides the government with a ready means for avoiding the reach of the transformation principle announced in *Widmar*.

Buchanan, 4 U. Ill. L. Rev. at 960-61.[8] *Widmar* and the Second Circuit's resolution of this case cannot be reconciled.

3. The Grayned Standard Avoids the Circularity Problem and Is Consistent with Widmar.

Amici believe that the Second Circuit's resolution of this case was not compelled by this Court's public forum cases, but was instead a misconstruction of those cases. *See supra* Sections I.A.2.-3., I.B.1.-4., and I.C.1.-2.

If, however, the Second Circuit properly applied this Court's most recent public forum analysis, the result reached in this case demonstrates that public forum analysis has become circular and is being used to deny the very protections it was meant to enforce. *See supra* Section I.C.1.

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[8]This case is also identical to Widmar in another respect: the school district in this case relies on a state statute that has been interpreted to limit the use of school facilities to nonreligious purposes, while the university in Widmar relied on an interpretation of the Missouri constitution forbidding access to the university's facilities by religious student groups. This Court held in Widmar that the federal constitutional right of access under the Free Exercise Clause and the Free Speech Clause overrode any contrary state law. 454 U.S. at 276. *See also* Laycock, 81 Nw. U.L. Rev. at 50 n.234 ("Widmar found a federal right of access to a university open forum that overrode contrary state law."). The same result necessarily follows here.

The solution would be to return to the incompatibility standard enunciated in *Grayned* and other earlier cases that served as the theoretical basis for public forum analysis: if the manner and subject of the speech is basically compatible with the normal activity of the public place at the time of the speech, any restriction of the speech should be strictly scrutinized. That standard prevents disruption of public fora while at the same time preventing unnecessary and unjustified discrimination against certain subjects or viewpoints, all without falling into definitional circularity.

> The attraction of *Grayned* is not difficult to appreciate. Its logic begins from the constitutionally congenial premise that the state should not suppress speech unless there is a good reason to do so. The reason for discouraging speech on government property is that it may interfere with the use of that property. If such interference occurs, the state may justifiably prohibit speech; conversely, the absence of interference indicates that the state may lack sufficient grounds to abridge speech. The doctrine proposed by *Grayned* thus invites courts to focus precisely on the relationship between speech and the reasons for its regulation, and it is designed to maximize the speech which the government is constitutionally required to tolerate, consistent with the appropriate and needful use of its property. This design flows naturally from the first amendment's central objective of ensuring "uninhibited, robust, and wide-open" public debate.

Post, 34 UCLA L. Rev. at 1766.

That is why, as Professor Post has observed, "[b]y far the great majority of commentators have advocated that some variant of the *Grayned* approach be adopted." *Id.* at 1765, citing M. Nimmer, *Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment* § 4.09[D], at 4-73-4-74 (2d ed. 1984); L. Tribe, *American Constitutional Law* 690-92 (1978); Cass, 65 Va. L. Rev. at 1317-18; Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 Ohio St. L.J. 247, 261-62 (1962); Stone, *Content-Neutral Restrictions*, 53 U. Chi. L. Rev. 46, 93-94 (1987); Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 Cardozo L. Rev. 335, 378-84, 423-24 (1986); Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 Stan. L. Rev. 117, 138 (1975); Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 Stan. L. Rev. 121, 143-51 (1982). *See also* Comment, 35 Cath. U.L. Rev. at 311, 331; Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 Geo. Wash. L. Rev. 109, 112 (1986).

II. THE SCHOOL DISTRICT'S EXCLUSION OF ONLY RELIGIOUS SPEECH IS UNCONSTITUTIONAL UNDER OTHER FREEDOM OF EXPRESSION PRINCIPLES.

A. The Exclusion Is Invidious Discrimination.

Exclusion of religious speech is no different (and no more related to the purposes of this forum) than exclusion of blacks' speech, or exclusion of women's speech, or exclusion of a nationality's speech: it is the most invidious of discriminations. In each case, the exclusion conveys the governmental message that the permitted speech is first class, and that the excluded speech is second class or worse. Such an exclusion orders religious speech off the constitutional bus.

This sort of exclusion strikes at the heart of the First Amendment:

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, it subject matter, or its content. *Cohen v. California*, 403 U.S. 15, 24 (1971); *Street v. New*

> *York*, 394 U.S. 576 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964). . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan*, *supra*, at 270.

Mosley, 408 U.S. at 95. An exclusion of religious speech rests overtly on its content, and on nothing else.

B. The Exclusion of Only Religious Speech Is Arbitrary and the School District Exercises Standardless Discretion in Enforcing the Exclusion, Which Constitutes a Prior Restraint.

1. Exclusion of Religious Speech Is Arbitrary.

Almost all religious speech is intermixed with political, philosophical, ideological, or other protected speech. The search for "pure" religious speech would not find many sermons and prayers, and would find little else. Instead, most religious speech involves religious perspectives on issues that others address from political, philosophical, or other ideological perspectives. A perfect example is the Focus on the Family Film series that Lamb's Chapel sought to exhibit in the school district's facilities, which involve not only Biblical principles about the family but secular psychology and other opinion.

Singling out religious speech for exclusion is arbitrary discrimination and is contrary to the oft-repeated test that there must be "neutrality between religion and religion, *and between religion and nonreligion*." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). *E.g., Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

It is also arbitrary to allow speech on a topic when it is from other perspectives, but to exclude it when it is from religious perspectives. There is no constitutionally permissible rationale for permitting some but not other perspectives on the same issue. Even in the most nonpublic of forums (a military base), an exclusion cannot "be applied irrationally, invidiously, or arbitrarily." *Greer*, 424 U.S. at 840. In other locations, many cases have found that exclusion of religious speech was arbitrary. *E.g., Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) ("completely arbitrary and discriminatory"); *Hague v. CIO*, 307 U.S. 496, 516 (1939) ("arbitrary suppression of free expression").

2. Exclusion of Religious Speech Is Discretionary and Standardless.

If religious speech is normally intermixed with other protected speech, any enforcement of a prohibition on religious speech must inherently involve standardless official discretion in determining what part of the mixed speech is religious and what speakers may be excluded as intolerably religious. What standard guided the official censor in determining that the Focus on the Family films must be excluded as "religious"? They were not excluded for being *wholly* religious, because the films contain much secular psychology. They must then have been excluded for being *too* religious. But what standards determined what percentage was too religious, what portions were religious perspectives in the overlap with psychology and counseling disciplines, and at what point entire films instead of only religious segments were excluded? The exclusion of the film required standardless determinations on each of those issues.

Such standardless discretion in identifying religion and excluding it violates the First Amendment as a prior restraint and censorship, as this Court recognized in *Cantwell v. Connecticut*:

> [The official] is empowered to determine whether

> the cause is a religious one . . . . His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a *censorship* of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and . . . the Fourteenth.

310 U.S. 296, 305-06 (1940). Such official discretion has been repeatedly condemned by this Court. *E.g., Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976); *Niemotko*, 340 U.S. at 271; *Kunz v. New York*, 340 U.S. 290, 294 (1951). Also, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times v. United States*, 403 U.S. 713, 714 (1971).

C. The Exclusion Shows Hostility Toward Religion, Which Is Prohibited by the Religion Clauses of the First Amendment.

1. The Establishment Clause Prohibits Hostility Toward Religion.

The Court has long recognized that hostility toward religion would violate the Establishment Clause, because that clause forbids not only "advancement [but] inhibition of religion." *Walz v. Tax Commission*, 397 U.S. 664, 672 (1970). The Court has cautioned that "affirmatively opposing or showing hostility to [theistic] religion" would impermissibly prefer nontheists over theists. *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963). Justice Goldberg's concurrence noted that "pervasive devotion to the secular" and "hostility to the religious" would contravene the Establishment Clause. *Id.* at 306. In *Everson*, the Court noted that government must not be the "adversary" of religion or "handicap" religions.

Everson v. Board of Education, 330 U.S. 1, 18 (1947). "[G]overnmental hostility to religion or religious teaching" would "be at war with . . . the free exercise of religion." *McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1948). Justice Brennan's concurrence when the Court struck down the exclusion of ministers from legislatures noted that "the exclusion manifests patent hostility toward . . . religion . . . and, in sum, has a primary effect which inhibits religion" in violation of the Establishment Clause. *McDaniel v. Paty*, 435 U.S. 618, 636 (1978).

Here, permitting other speech while excluding religious speech was simply "preferring those who believe in no religion over those who do believe," contrary to the Establishment Clause. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

2. The Free Exercise Clause Prohibits Hostility Toward Religion.

As Professor Archibald Cox has noted, "[t]he framers put freedom of conscience first, and then moved on to freedom of speech and the press. They were concerned above all else with spiritual liberty: freedom to think, to believe, and to worship." A. Cox, *Freedom of Expression* 1 (1982). This Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and other decisions has shown deep respect for religious rights. The Court has routinely struck down discrimination against religion, whether in excluding religious groups from public universities, *Widmar*, 454 U.S. at 269-70, in excluding ministers from state legislatures, *McDaniel*, 435 U.S. 618, or in excluding seminary students from university grants to the blind, *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). Such "hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of free exercise of religion.' *McCollum, supra*, at 211-212." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

The decision in *Employment Division v. Smith*

condemns this sort of discrimination against free exercise of religion, when it forbids laws directly prohibiting free exercise of religion. --- U.S. ---, 110 S. Ct. 1595 (1990). The school district's rule that bars religious speech is precisely a rule prohibiting free exercise.

D. The Exclusion Denies Due Process and Equal Protection Because It Is Unconstitutionally Overbroad.

The exclusion of all religious speech censors not just the religious portions but the nonreligious portions of speech. For example, the exclusion of the Focus on the Family film applied not only to its Biblical discussion but also to its secular psychology. This overt exclusion of nonreligious speech mixed with religious speech is the first aspect of overbreadth. The exclusion of religion also chills speech by speakers with religious viewpoints. Those speakers, instructed that they may not engage in (undefined) religious speech, inevitably will censor themselves and avoid even speech that is permitted from fear of violating the prohibition. This practical exclusion of nonreligious speech is the second aspect of overbreadth.

This Court has consistently decried such overbreadth. It struck down the prohibition of all "First Amendment activities" in the Los Angeles airport:

> We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.

Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. at 575. *E.g., Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). No conceivable governmental interest justifies "such an absolute prohibition of [religious] speech" here, particularly when the forum is a designated public forum. The uneventful use of the public school facility for nonreligious speech shows the lack of any governmental interest in prohibiting any nondisruptive speech, and the overbreadth of

prohibiting religious speech.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to reverse the judgment of the United States Court of Appeals for the Second Circuit in this case.

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Respectfully submitted,

WENDELL R. BIRD*
DAVID J. MYERS
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400

*Counsel of Record

Attorneys for Amici Curiae